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HAROLD B. WILLEY, Cl

No. 467

IN THE

Supreme Court of the United States

October Term, 1954

CHARLES SCHIFFMAN,

Petitioner,

—against—

FRED T. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, McNEIL ISLAND, WASHINGTON,

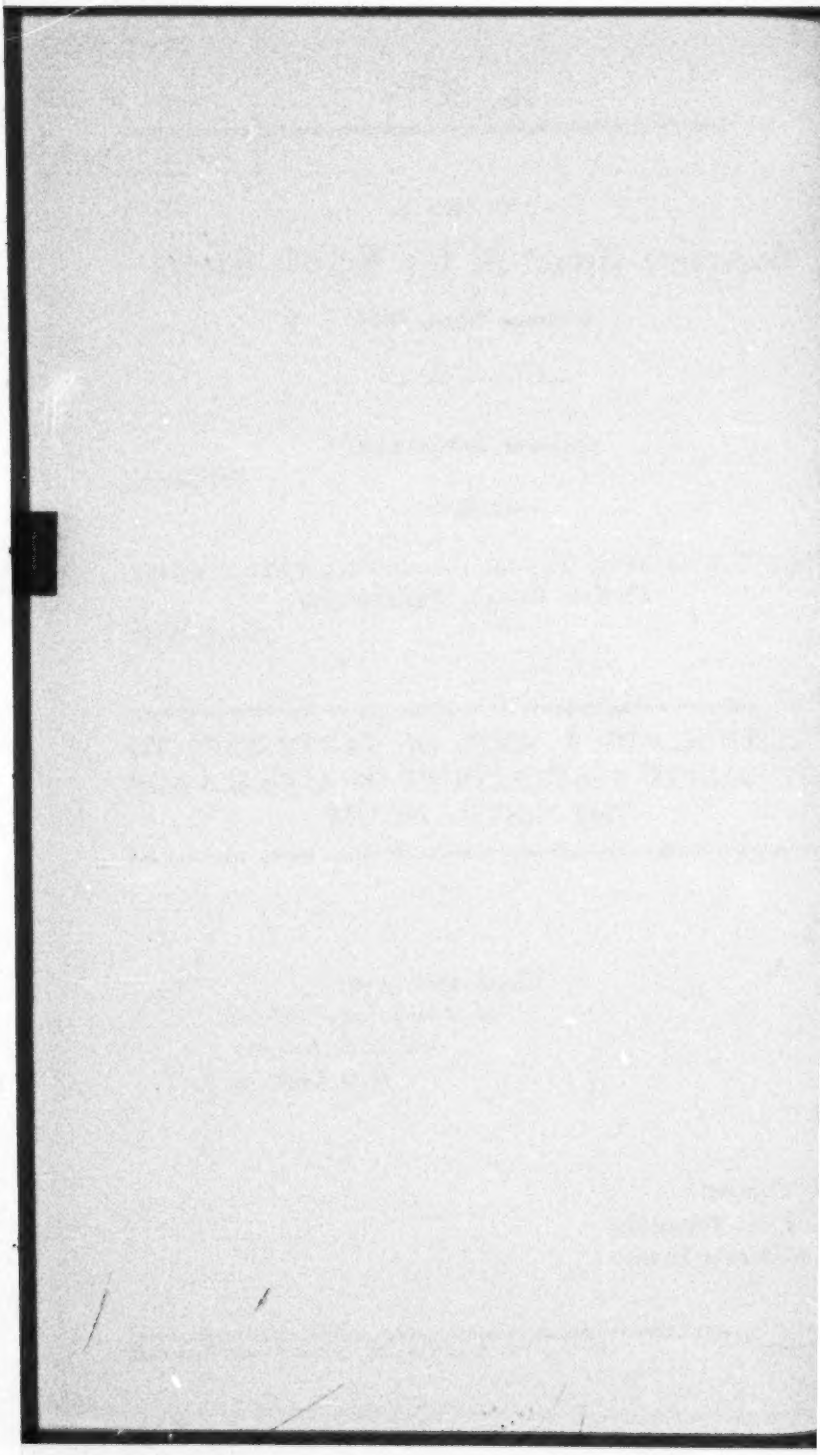
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOSES POLAKOFF
Attorney for Petitioner
475 Fifth Avenue
New York 17, N. Y.

Of Counsel:
MOSES POLAKOFF
SHELDON LOWE

33 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485



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CHARLES SCHIFFMAN,

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FRED T. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, McNEIL ISLAND, WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on November 3, 1954.

Citations to Opinions Below

The memorandum decision of the District Court (R. 12-13), printed in Appendix B hereto, *infra*, pp. 23-24, is unreported. The opinion of the Court of Appeals (R. 39-42),

printed in Appendix B hereto, *infra*, pp. 18-22, is reported in F. 2d (as yet unreported).

Jurisdiction

The judgment of the Court of Appeals was entered on November 3, 1954 (R. 43) and is printed in Appendix B hereto, p. 25, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Question Presented

Whether, in view of 18 U. S. C., Section 4164, as amended June 29, 1951, petitioner, conditionally released on parole on January 22, 1949, the maximum expiration date of that sentence being May 6, 1952, was lawfully arrested on February 6, 1954, pursuant to a warrant issued by the United States Board of Parole on May 2, 1952, for a violation of his conditional release which occurred on March 18, 1951, for which violation he was indicted and arrested on March 7, 1952, pleaded guilty on November 17, 1952, was sentenced to a term of three years on November 26, 1952, which sentence was later reduced to eighteen months, and from which he was conditionally released on parole on February 6, 1954.

Statutes Involved

The statutory provisions involved are the Act of June 25, 1948, c. 645, 62 Stat. 854, 18 U. S. C., Section 4205; the Act of June 29, 1951, c. 176, 65 Stat. 98, 18 U. S. C. Section 4164, as amended June 29, 1951 and the Act of July 30,

1947, c. 388, Section 1, 61 Stat. 633, 1 U. S. C., Section 109. They are printed in Appendix A hereto, *infra*, pp. 16-17.

Statement

On March 15, 1954, petitioner, held in custody by the respondent, Warden of the United States Penitentiary at McNeil Island, Washington, petitioned the United States District Court for the Western District of Washington, Southern Division, for a Writ of Habeas Corpus (R. 3-6). A Writ was issued on March 15, 1954, returnable on April 1, 1954 (R. 7). The Writ was served upon the respondent on March 19, 1954 (R. 8) and his answer and return thereto was filed on March 31, 1954 (R. 8-12). The matter was heard on April 1, 1954 (R. 20) and on the same day a memorandum decision was rendered denying the petition and discharging the Writ (R. 12-13). The memorandum decision is printed in Appendix B hereto, *infra*, pp. 23-24.

On April 9, 1954, the District Judge made findings of fact and conclusions of law in connection with the habeas corpus proceeding (R. 14-19). The findings of fact, so far as they are material herein, will be set forth in the following form for the convenience of the Court:

> JULY 18, 1940 — Petitioner was sentenced to imprisonment for a term of ten years by the United States District Court for the Northern District of Texas, Fort Worth Division, said term to commence upon completion of a sentence he was then serving in an Illinois prison (R. 15).
>
> MAY 7, 1942 — Petitioner was released from the Illinois prison and surrendered to Federal authorities at Leavenworth, Kansas, to commence his ten year sentence (R. 15).

JANUARY 22, 1949 — Petitioner was conditionally released on parole from Leavenworth after serving his term less deductions for good time (R. 15).

MARCH 18, 1951 — Petitioner violated his conditional release, for which violation he was indicted in the United States District Court for the Northern District of California, Southern Division, on March 7, 1952 (R. 15).

NOVEMBER 8, 1951 — Expiration date of ten year maximum term less 180 days (termination of conditional release, 18 U.S.C., Section 4164, as amended June 29, 1951) (R. 13).

MARCH 7, 1952 — Petitioner was indicted in the United States District Court for the Northern District of California, Southern Division, for the act committed on March 18, 1951, which constituted a violation of his conditional release. He pleaded guilty to that indictment on November 17, 1952 (R. 15).

MAY 2, 1952 — A warrant of retaking was issued by the United States Board of Parole for petitioner's violation of his conditional release which occurred on March 18, 1951 (18 U.S.C., Section 4205) (R. 16).

MAY 6, 1952 — Maximum expiration date of ten year sentence imposed upon petitioner by the United States District Court for the Northern District of Texas, Fort Worth Division (R. 10).

NOVEMBER 26, 1952 — Petitioner was sentenced to imprisonment for a term of three years (later reduced to eighteen months) by the United States District Court for the Northern District of California, Southern Division, after a plea of guilty on November 17, 1952, to the indictment returned against him on March 7, 1952 (R. 10-11).

FEBRUARY 6, 1954 — Petitioner was conditionally released on parole from his eighteen month sentence and simultaneously therewith the warrant of retaking issued by the United States Board of Parole on May 2, 1952, was executed upon him. He was retained in the custody of the respondent as a conditional release violater to serve the balance of his original ten year term (R. 10-11).

Upon the foregoing facts, the District Court concluded that it had jurisdiction of the parties to this cause and the subject matter thereof; that the United States Board of Parole had the power to issue the warrant of retaking and revoke the petitioner's conditional release; that petitioner had failed to establish grounds entitling him to a release from his confinement by the respondent and that the petition for a Writ of Habeas Corpus should be denied and petitioner remanded to respondent's custody to complete his original ten year term (R. 17-19). An order denying the petition, discharging the Writ and remanding the petitioner was filed April 9, 1954 (R. 20-22).

The court below unanimously affirmed the order of the District Court and its opinion dated November 3, 1954 (R. 39-42), is printed in Appendix B hereto, *infra*, pp. 18-22.

Reasons for Granting the Writ

1. The court below has decided an important question of federal law and statutory construction which has not been, but should be settled by this Court. The question presented is of importance in the administration of the federal parole laws and settlement thereof will clearly define the rights of persons subject thereto who might otherwise be unlawfully deprived of their liberty.

On June 29, 1951, 18 U. S. C., Section 4164 was amended to provide that a prisoner who has served his sentence less deductions for good time, shall, upon release, be deemed as if released on parole until the expiration of his maximum term or terms less one hundred and eighty days (Statute printed in Appendix A hereto, *infra*, p. 16).

The legislative history and purpose of the amendment are set forth in Senate Report No. 385, June 4, 1951, Eighty-second Congress, first session, and House Report No. 314, April 11, 1951, Eighty-second Congress, first session. See also 1951 U. S. Code Congressional and Administrative Service, Vol. 2, pp. 1544-1547.

The Senate Report, which repeats in substance the House Report, states:

> "The purpose of this bill (S. 1366) is to amend Section 4164 so as to provide that a prisoner who has served his sentence, less good time deductions, shall be released unconditionally if there remain less than 180 days to serve under the maximum term or terms of his sentence; and, if there remains a greater period to serve, the prisoner shall be treated upon release as if he were released upon parole until the expiration of the maximum term or terms for which he was sentenced, less 180 days."

18 U. S. C., Section 4205, provides that a warrant for the retaking of any United States prisoner who has violated his parole may be issued within the maximum term or terms for which he was sentenced (Statute printed in Appendix A hereto, *infra*, p. 16).

The petitioner was conditionally released from imprisonment on January 22, 1949. The foregoing amendment of

18 U. S. C., Section 4164, did not become effective until June 29, 1951. In *Edelson* v. *Sweet*, 2 Cir., 197 F. 2d 146, the court held that the amendment of 18 U. S. C., Section 4164 applied retroactively to prisoners who were, at the time of its enactment, under parole supervision for the remainder of their maximum sentence.

Moorehead v. *Hunter*, 10 Circ., 198 F. 2d 52, is not contrary to the holding in *Edelson* v. *Sweet, supra*. The precise question before the court in *Moorehead* v. *Hunter, supra*, was whether the amended section applied to an infraction or violation of a conditional parole on which a parole violator's warrant was issued prior to the effective date thereof, although the hearing or trial thereon was not had until after such effective date. The court held that in view of 1 U. S. C., Section 109 (Statute printed in Appendix A hereto, *infra*, p. 17), the Amendment of June 29, 1951, did not apply where a parole violator's warrant was issued prior to the effective date thereof. It will be observed that in the case at bar the parole violator's warrant was issued on May 2, 1952—subsequent to the effective date of the Amendment. In both *Moorehead* v. *Hunter, supra*, and the case at bar, the warrants were issued within 180 days of the expiration of the maximum term, and it is evident from its opinion that the court in *Moorehead* v. *Hunter, supra*, would have reached a different result therein and arrived at the conclusion urged herein by the petitioner, if the violator's warrant had been issued subsequent to the effective date of the Amendment. At page 53 of 198 F. 2d, the court says:

> "Original Section 4164 was amended by the Act of June 29, 1951, by adding thereto the following: 'less one hundred and eighty days'. Prior to the

amendment, a conditional parole could be revoked for cause any time prior to the expiration of the maximum release date. Thereafter it could be revoked only if at least 180 days of the original sentence remained."

A more detailed analysis will be made of *Moorehead* v. *Hunter, supra,* later, to show this Court that there is an actual conflict between the decision of the Court of Appeals for the Tenth Circuit in *Moorehead* v. *Hunter, supra,* and the decision of the Court of Appeals for the Ninth Circuit in the case at bar.

The petitioner herein was conditionally released on parole on January 22, 1949. The maximum expiration date of his sentence was May 6, 1952; the maximum expiration date of his sentence less 180 days was November 8, 1951. The warrant for the violation of his conditional release was issued May 2, 1952—four days prior to the maximum expiration date of his sentence, but subsequent to the maximum expiration date of his sentence less 180 days. The violation of his conditional release, which was the basis for the warrant of May 2, 1952, occurred on March 18, 1951—prior to the maximum expiration date of his sentence less 180 days.

In view of the June 29, 1951 amendment of 18 U. S. C., Section 4164, the foregoing facts give rise to difficult questions of statutory construction. If the words "maximum term" as used in 18 U. S. C., Section 4205 are construed to mean the maximum expiration date of petitioner's sentence; that is, May 6, 1952, then the warrant issued May 2, 1952 was timely; if the words "maximum term" as used in Section 4205 are construed to mean "maximum term

less 180 days'' as a result of the June 29, 1951 amendment of 18 U. S. C., Section 4164, then the warrant was not seasonably issued and petitioner's detention thereunder is unlawful. The June 29, 1951 amendment of 18 U. S. C., Section 4164 was enacted subsequent to 18 U. S. C., Section 4205.

The petitioner contends that the June 29, 1951 amendment applies to him; that since there remained less than 180 days of his original sentence when the parole violator's warrant issued he could not be detained, and that the warrant was void under 18 U. S. C., Section 4205.

The respondent does not agree with this contention and urges that it was not the intention of Congress in enacting the June 29, 1951 amendment to relieve conditional releasees from penalties attaching to violations of conditional releases occurring before the 180 day period begins; that if a violation of a conditional release occurs prior to the commencement of the 180 day period the conditional releasee occupies a position analogous to that of an escaped prisoner and that the authority of the Board of Parole to issue a warrant of retaking based upon such an offense continues until the expiration of the maximum term.

The court below affirmed the denial of the petition and held that since the petitioner violated the terms of his conditional release prior to the commencement of the 180 day period his position was like that of an escaped convict and that such violation tolled the expiration of his sentence.

In its opinion the court below relies for its authorities upon cases decided long prior to the June 29, 1951 amendment of 18 U. S. C., Section 4164, two of them having been decided by this Court; *Anderson* v. *Corall*, 263 U. S. 193

and *Zerbst* v. *Kidwell*, 304 U. S. 359, and thus the question now before this Court could not have been considered therein. That the question is one of first impression in this Court is confirmed by *Moorehead* v. *Hunter, supra*, decided July 1, 1952, wherein the violation of a conditional parole also occurred prior to the 180 day period, and wherein the court says at page 53 of 198 F. 2d:

> "Apparently this question has not arisen in any case and is one of first impression."

It must be presumed that the Court of Appeals for the Tenth Circuit was cognizant of the rulings of this Court in *Anderson* v. *Corall, supra*, and *Zerbst* v. *Kidwell, supra*.

Wall v. *Hunter*, 105 F. Supp. 54, appears to be directly in point and to support the view urged herein by the petitioner. In *Wall* v. *Hunter, supra*, decided in 1952, the petitioner was conditionally released on March 9, 1951. The maximum expiration date of his sentence, without good time was April 6, 1952. A warrant for the alleged violation of his conditional release was issued on November 26, 1951 and served on February 6, 1952. The petitioner was being held under the said warrant for service of the good time earned under his sentence. He contended that his detention was unlawful and that as a result of the June 29, 1951 amendment his obligations as a conditional releasee terminated on October 9, 1951, by virtue of the 180 day provision of the amendment. The warrant was issued subsequent to that date. The court agreed with the petitioner's contentions and at page 55 of 105 F. Supp., says:

> "The court concludes as a matter of law that the amendment of 18 U.S.C., Section 4164, applies to petitioner, and is of the opinion that the petitioner is entitled to the benefits of the last-mentioned stat-

ute and that therefore his term as a conditional releasee was concluded on October 9, 1951, and he therefore was not subject to be arrested under the warrant of the United States Board of Parole issued on November 26, 1951."

It is significant that the court, speaking through Judge Mellot, the Chief Judge thereof, in deciding the question presented did not mention or regard as of any importance the date upon which the violation of the conditional release occurred, although it appears from the facts set forth in the opinion that the violation occurred prior to the expiration of the maximum term less 180 days.

Although the decision in *Wall* v. *Hunter, supra,* is that of a District Court, it is one whose opinion in matters of this sort is highly respected. Because it is in the district in which Leavenworth Penitentiary is located, it is constantly called upon to decide and deal with questions of the present nature.

2. The Court of Appeals for the Tenth Circuit in *Moorehead* v. *Hunter,* 198 F. 2d 52, has rendered a decision in conflict with that of the Court of Appeals for the Ninth Circuit in the case at bar.

An analysis of the facts in *Moorehead* v. *Hunter, supra,* reveals that there is an actual conflict between its decision and that of the court below. For convenience the opinion in that case is printed as Appendix C hereto, *infra,* pp. 26-30.

In *Moorehead* v. *Hunter, supra,* the maximum expiration date of petitioner's first sentence was June 6, 1949. He was conditionally released therefrom on August 6, 1948. On August 22, 1948, he received a second sentence on

another offense, and the maximum expiration date under that sentence was August 21, 1952. By virtue of good time earned he became eligible for conditional release under the second sentence on October 13, 1951, and he was conditionally released on that date. Simultaneously with his conditional release from the second sentence a warrant for an alleged violation of his conditional release under the first sentence was served upon him. The warrant had been issued by the Board of Parole on February 24, 1949. A hearing was not had thereon until November 13, 1951, at which time the Board issued a certificate of revocation. The petitioner was remanded to serve the balance of his first sentence.

The petitioner based his claim to a release upon 18 U. S. C., Section 4164, as amended June 29, 1951 and contended that since there remained less than 180 days of his original sentence when the parole violator's warrant was issued he could not be returned to the institution. The only fact that distinguishes *Moorehead* v. *Hunter, supra,* from the case at bar is that the parole violator's warrant, although issued within 180 days of the original sentence, was issued prior to the effective date of the June 29, 1951 amendment and the hearing thereon was not held until after the effective date thereof. The court held that in view of 1 U. S. C., Section 109 (printed in Appendix A hereto) the amendment did not apply where a parole violator's warrant was issued prior to the effective date thereof. The court clearly indicated that were it not for that fact the petitioner's contention would be correct. At page 53 of 198 F. 2d, the court says:

> "Original Section 4164 was amended by the Act of June 29, 1951, by adding thereto the following:

> 'less one hundred and eighty days'. Prior to the amendment, a conditional parole could be revoked for cause any time prior to the expiration of the maximum release date. Thereafter it could be revoked only if at least 180 days of the original sentence remained."

In affirming the denial of the petition in *Moorehead v. Hunter, supra,* the court relied upon 1 U. S. C., Section 109, and held that the June 29, 1951 amendment did not apply where a warrant had been issued prior to the effective date thereof. In his brief submitted to the court below, the respondent in the case at bar relied upon 1 U. S. C., Section 109 and urged that the June 29, 1951 amendment did not apply even if the warrant had been issued subsequent to the effective day thereof.

In its opinion the court below commented upon the provisions of 1 U. S. C., Section 109, but felt it was unnecessary to consider its effect in deciding the matter before it. This only points up more clearly petitioner's contention that the case at bar presents an important question of federal law and statutory construction which has not been, but should be settled by this Court—the first reason urged by petitioner for granting this application for a writ of certiorari.

3. The decision of the court below is believed to be erroneous.

In its opinion the court below relies for its authorities upon cases decided long prior to the June 29, 1951 amendment of 18 U. S. C., Section 4164, wherein the question herein presented could not have been considered. In fact, one of the authorities relied upon is its own decision in

Klinker v. *Squier*, 9 Circ., 144 F. 2d 490, which was decided in 1944, and which in turn cites the same cases as the opinion below. Petitioner herein respectfully submits that in so doing the court below has caused and perpetuated an erroneous construction of the statutes involved herein—a construction that overlooks their clear language and renders them unconstitutional and in violation of due process of law.

18 U. S. C., Section 4205, provides that a warrant for the retaking of any United States prisoner who has violated his parole may be issued "within the maximum term or terms for which he was sentenced".

Petitioner herein contends that as a result of the amendment of June 29, 1951, his term as a conditional releasee was concluded 180 days prior to the maximum expiration date of his sentence; that is, on November 8, 1951, and that a warrant of retaking must have been issued prior thereto to have been valid under 18 U. S. C., Section 4205. The court below rejected this contention and held that it is not the issuance of a warrant that tolls the expiration of the sentence, but the misbehavior of the parolee. The court has thus engrafted upon Section 4205 a construction never intended and contradictory to its clear language.

The decision below is erroneous, because according thereto a conditional releasee who has completed his maximum sentence without having had a warrant of retaking issued or executed upon him might thereafter be arrested for an alleged violation which occurred long prior thereto. Statutes of limitation relate to all but the most serious crimes and have long been accepted as part of our criminal jurisprudence. If there were no statute of limitation

relating to a crime, except the most serious thereof, such as murder or treason, it would be in violation of the due process clause of the Constitution. It would seem that the same considerations of fairness and justice which give rise to statutes of limitation as they relate to crimes should be applicable to acts which constitute a violation of parole. Particularly so, where the act which constitutes the parole violation may be the basis for a separate prosecution if commenced within the time set forth in the statute of limitations relating thereto. We might thus have the paradoxical situation where the statute of limitations has run as to a crime which constitutes a parole violation but a warrant of retaking may yet issue for said violation. The act which constitutes the parole violation does not necessarily have to constitute a crime; it may be some minor infraction or breach of parole such as keeping late hours, or bad company or not reporting when required to.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

December 1st, 1954.

Respectfully submitted,

MOSES POLAKOFF
Attorney for Petitioner

Of Counsel:
MOSES POLAKOFF
SHELDON LOWE

APPENDIX A

Statutes Involved

1. 18 U. S. C., Section 4164

"Section 4164. RELEASED PRISONER AS PAROLEE

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody. Added June 29, 1951, c. 176, 65 Stat. 98."

2. 18 U. S. C., Section 4205

"Section 4205. RETAKING PAROLE VIOLATOR UNDER WARRANT; TIME TO SERVE UNDIMINISHED

A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve. June 25, 1948, c. 645, 62 Stat. 854."

Appendix A

3. 1 U. S. C., Section 109

"Section 109. REPEAL OF STATUTES AS AFFECTING EXISTING LIABILITIES

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388 Section 1, 61 Stat. 633."

APPENDIX B

1. Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 14,372
Nov. 3, 1954

CHARLES SCHIFFMAN,

Appellant,

—VS.—

FRED T. WILKINSON, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

Appeal from the United States District Court for the Western District of Washington, Southern Division

Before: DENMAN, HEALY, and CHAMBERS, *Circuit Judges*

HEALY, *Circuit Judge*

This case is here on appeal from a denial of the writ of habeas corpus. The only substantial issue relates to the applicability or effect of §4164, Title 18 USCA, as amended June 29, 1951, hereafter quoted.

Appellant was by the United States District Court for the Northern District of Texas sentenced to serve a term

of 10 years for violation of the Federal Narcotics Act. He began service of the sentence May 6, 1942. He was conditionally released January 22, 1949. On or about March 18, 1951 he committed the crime of engaging in a conspiracy to violate the Narcotics Act. His maximum term under his original sentence expired May 6, 1952. On March 7, 1952 he was indicted on the conspiracy charge. On May 2, 1952—four days prior to the expiration date of the 10-year term—a warrant of retaking was issued by the Parole Board for violation of his conditional release.

Appellant pleaded guilty to the conspiracy charge on November 26, 1952, and was sentenced to a term of three years, the sentence being made by the judge to run concurrently with the remainder of his prior 10-year sentence.[1] The conspiracy sentence was later reduced to 18 months with a recommendation that the reduced sentence be considered by the Parole Board. This 18-month sentence less good behavior terminated February 6, 1954. On that date the Parole Board's warrant for retaking, earlier issued as aforesaid, was executed by taking appellant into custody, and he is now serving the unserved portion of the 10-year sentence.

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[1] As to the lack of authority in the district court to provide that the unexpired portion of the 10-year sentence was to run concurrently with the sentence pronounced on the conspiracy charge, consult Zerbst v. Kidwell, 304 U. S. 359; Tippitt v. Wood, 140 F. 2d 689; Hammerer v. Huff, 110 F. 2d 113; Tippitt v. Squier, 145 F. 2d 211.

Here the Parole Board, as was within its sole discretion, did not recognize the district court's attempt to require the 10-year sentence to be served concurrently with the conspiracy sentence. No question is raised now on this point, apparently because it was regarded as settled by the above decisions.

Appendix B

The relevant statutes are set out on the margin.[2]

We here note in passing the provisions of a general statute relied on to some extent in the government's brief, namely 1 USCA §109. In substance, this law states that the repeal of any statute shall not have the effect to release or extinguish any penalty, etc., under such statute unless the repealing act expressly so provides; and such statute shall be treated as remaining in force for the purpose of sustaining enforcement of such penalty, etc. For reasons presently to appear we think it unnecessary to consider the effect of this statute.

Appellant argues that the June 29, 1951 amendment of section 4164 applies, and he asserts that under this amend-

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[2] 18 USCA §4205:

"A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve."

18 USCA §4164 (as it was prior to the amendment of June 29, 1951) reads:

"A prisoner having served the term or terms for which he shall have been sentenced after June 29, 1932, less good time deductions, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced.
. . . ."

18 USCA §4164 (as amended June 29, 1951):

"A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.
. . . ."

ment his maximum term less 180 days expired on November 8, 1951. Since the Parole Board's warrant of retaking was issued subsequent to November 8, 1951, he says the warrant was void under 18 USCA §4205, quoted in footnote 1 supra.

The position of the government on oral argument is that the June 29, 1951 amendment of section 4164 is in effect a minimum-term statute. Legislative history confirms such interpretation, see 1951 U. S. Congressional Code Service 1544-47. It appears that the purpose of Congress was to avoid the cost of returning conditional releases to serve less than 180 days, and to reduce the burden on the Parole Board personnel by ending parole supervision of them 180 days before their sentences would normally expire. It was clearly not the intention to relieve such releases from penalties attaching to violations of conditional releases occurring *before* the 180-day period begins. From this it follows that if a breach of parole occurs during the minimum sentence created by the statute (that is, the maximum term less 180 days) the conditionally released convict occupies a position analogous to that of an escaped prisoner. See Anderson v. Corall, 263 U. S. 193, 196; Zerbst v. Kidwell, 304 U. S. 359, 361. The authority of the Parole Board to issue a warrant of retaking based on such an offense continues until the expiration of the maximum sentence. United States ex rel. Anderson v. Anderson, 8 F. Supp. 812. As this court observed in Klinkner v. Squier, 144 F. 2d 490, 491, "it is not the issuance of a warrant charging parole violation that tolls the expiration of a minimum sentence, but the misbehavior of the parolee."

The facts bring appellant within this rationale. He committed the offense which violated his conditional release on March 18, 1951, whereas his minimum term under the amended section 4164 did not expire until November 8, 1951. Since his maximum term did not expire until May 6, 1952, the warrant of retaking issued four days prior to that date was valid.

Affirmed.

(Endorsed:) Opinion. Filed Nov. 3, 1954.

PAUL P. O'BRIEN, *Clerk.*

Appendix B

2. Memorandum Decision of the District Court

DISTRICT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

No. 1776

CHARLES SCHIFFMAN,

Petitioner,

—vs.—

FRED T. WILKINSON, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent.

The language of the Supreme Court opinions in *Zerbst v. Kidwell,* 304 U. S. 360 and *Anderson* v. *Corall,* 263 U. S. 193, indicates that the running of the term of a criminal sentence is tolled from the date of an offense constituting a parole violation. The Court of Appeals for the Ninth Circuit has used language almost precisely to such effect. *Klinker* v. *Squier,* 144 F. 2d 490 at page 491.

In the present case it is admitted that the parole violation offense occurred March 18, 1951, and prior to November 8, 1951, on which date petitioner's basic ten-year term less 180 days expired. If the parole violation offense, rather than the issuance of warrant thereon, tolled the running of the basic term, the warrant pursuant to which petitioner is now confined was issued within the period specified by 18 U. S. C. 4164.

Appendix B

Petitioner cites a Kansas District Court decision, *Wall* v. *Hunter*, 105 Fed. Sup. 54, as being "on all fours" with the present case. It does not appear from the opinion in that case whether the parole violation offense was committed within the period of the basic term less 180 days but the dates cited indicate that the offense could have been committed after that time. If such was the fact, that decision would not support petitioner's contentions in the present case. In any event, the Wall decision does not give effect to 18 U. S. C. 4205 and appears to be out of harmony with the Supreme Court decisions referred to.

Petition denied and writ of habeas corpus issued March 15, 1954, discharged.

Dated at Tacoma, Washington, this 1st day of April, 1954.

/s/ GEO. H. BOLDT,
United States District Judge.

Filed April 2, 1954.

Appendix B

3. Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 14,372

CHARLES SCHIFFMAN,

Appellant,

—VS.—

FRED T. WILKINSON, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

APPEAL from the United States District Court for the Western District of Washington, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered November 3, 1954,
PAUL P. O'BRIEN, Clerk.

APPENDIX C

Opinion of Court of Appeals for the Tenth Circuit in *Moorehead* v. *Hunter*, 198 F. 2d 52

Before PHILLIPS, *Chief Judge*, and BRATTON and HUXMAN, *Circuit Judges*.

HUXMAN, *Circuit Judge*.

This is an appeal from the judgment of the trial court, discharging a writ of habeas corpus and remanding appellant to the custody of Walter A. Hunter, Warden of the Federal Penitentiary at Leavenworth, Kansas. The facts are these. On June 7, 1946, appellant was committed to serve a three year sentence for violation of the Dyer Act [1948 Revised Criminal Code, 18 U.S.C.A. §2311 et seq.]. The maximum expiration date of the sentence, without good time, was June 6, 1949. Appellant earned 304 days of good time, which made him eligible for conditional release and he was released on August 6, 1948.

On August 22, 1948, appellant was committed to the United States Penitentiary for three years on another offense. The maximum expiration date under that sentence was August 21, 1952. By virtue of good time earned, he became eligible for release under that sentence October 13, 1951. A warrant for an alleged violation of his conditional release under the first sentence was issued by the United States Board of Parole February 24, 1949. The warrant was served on him on October 13, 1951, the date on which he was conditionally released from his second sentence. On November 13, 1951, the Board, pursuant to a hearing, issued a certificate of revocation, revoked his parole and

remanded him to the custody of the warden to serve the remainder of the first sentence of 304 days less good time earned thereafter.

Appellant's claim to a release is based upon 18 U.S.C.A. §4164, as amended June 29, 1951, which reads as follows: "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days." Appellant's contention is that since there remained less than 180 days of his original sentence when the parole violator's warrant was issued he could not be returned to the institution. Original Section 4164 was amended by the Act of June 29, 1951, by adding thereto the following: "less one hundred and eighty days." Prior to the amendment, a conditional parole could be revoked for cause any time prior to the expiration of the maximum release date thereafter it could be revoked only if at least 180 days of the original sentence remained. The precise question before us is whether the amended section applies to an infraction or violation of a conditional parole on which a parole violator's warrant was issued prior to the effective date of the Amendment of June 29, 1951, although the hearing or trial thereon was not had until after such effective date. Apparently this question has not arisen in any case and is one of first impression.

[1] Appellant relies upon the common law principle quite generally followed by the federal and state courts alike that where a criminal statute is amended, lessening

the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto. It is conceded that these principles apply only when there is no general saving statute or a specific saving clause in the repealing statute. Concerning these principles, there is no dispute and, therefore, citation of authorities and their discussion and analysis would not be helpful.

[2] While conceding that there is no saving clause in the Amendment of June 29, 1951, appellee contends that general savings clause, 1 U.S.C.A. §109, applies and requires that the validity of the revocation in this case be determined by 18 U.S.C.A. §4164, as it was prior to the amendment. 1 U.S.C.A. §109 provides that "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Appellant's reply to this contention is that this section applies only in case of a repeal of a statute and not when as here a statute is amended. With this attempted distinction we cannot agree. Whether an existing statute is specifically repealed and a new and different one is passed to replace it, or whether the existing statute is modified by amendment, is in our view immaterial. In either event, a new statute comes into being and the old one ceases to exist. We, therefore, hold that 1 U.S.C.A. §109 must be considered with relation to the problem presented here the same as though old Section

4164 had been repealed and the present section had been passed in its stead.

Section 109 provides that the repeal of a statute shall not release or extinguish any penalty or forfeiture or liability incurred thereunder, unless the repealing act shall so expressly provide and that the repealed act shall remain in force for the purpose of sustaining any proper action or prosecution for the enforcement of a penalty, forfeiture, or liability. In United States v. Reisinger, 128 U. S. 398, 9 S. Ct. 99, 32 L. Ed. 480, the Supreme Court discussed the meaning of the terms " 'penalty, forfeiture, or liability' " and held that the term liability was intended to cover any form of punishment to which one subjects himself by violating the common laws of the country.

[3, 4] The violations of the terms of a conditional parole bring into being a new offense for which, upon being found guilty in a proper proceeding, one may be punished. This is a new punishment not a part of the original punishment and consists of a forfeiture of good time. Here the new offense had been committed and the parole violator's warrant issued prior to the effective date of the 1951 Amendment. Had appellant been tried at once, the right of imposing the punishment or forfeiture of 304 days of good time clearly would have existed. The Amendment of June 29, 1951 did not extinguish the offense committed prior thereto nor deprive the Board of jurisdiction under the warrant, which likewise had been issued prior to the effective date of the amendment, to hear and determine the case, make findings, and inflict penalties therefor.

Such cases as Voorhees v. Cox, 8 Cir., 140 F. 2d 132, upon which appellant relies, are distinguishable in principle and have no application here. All the Voorhees case held was that the savings statute did not preserve the old procedural requirements but it also held that the substantive rights and liabilities under the old statute remained in force and effect. We are here concerned with substantive rights and liabilities and not with procedural matters. This opinion is expressly limited in scope to the facts as they appear in this case.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 467

CHARLES SCHIFFMAN, PETITIONER

v.

FRED T. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, McNEIL ISLAND, WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 18-22; R. 39-42) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 3, 1954 (Pet. 25; R. 43). The petition for a writ of certiorari was filed on December 3, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

18 U. S. C. (1952 ed.) 4164, as amended in 1951, provides that a conditionally released prisoner shall be deemed as if released on parole until the expiration of his maximum term less 180 days. Petitioner, who was serving a ten-year sentence, was conditionally released from custody. He violated his conditional release prior to the beginning of the 180-day period, but the warrant returning him to custody, although issued prior to the expiration of his maximum term, was not issued until after the beginning of the 180-day period. The question presented is whether, in the circumstances, petitioner was properly retaken into custody.

STATUTES INVOLVED

18 U. S. C. (1946 ed.) 4164 provided in part:

> A prisoner having served the term or terms for which he shall have been sentenced after June 29, 1932, less good time deductions, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced.

18 U. S. C. (1946 ed.) 4164, as amended by the Act of June 29, 1951, c. 176, 65 Stat. 98, 18 U. S. C. (1952 ed.) 4164, reads as follows:

> A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the

expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

* * * * *

18 U. S. C. 4205 provides:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

STATEMENT

In July 1940, petitioner was convicted in the United States District Court for the Northern District of Texas for a narcotics violation and sentenced to imprisonment for ten years (R. 3, 9, 15). He was released on conditional release on January 22, 1949 (R. 4, 9, 15) and was ordered to remain under Parole Board supervision until the expiration of his full sentence on May 6, 1952, a period of 40 months (R. 4, 9).

On or about March 18, 1951, within the parole supervision period, petitioner committed an overt act in furtherance of a narcotic conspiracy. He was arrested on this charge in March 1952. On

November 26, 1952, he pleaded guilty to this offense and was sentenced to imprisonment for 18 months. (R. 4, 9-10, 15-16, 25-29.)[1]

On May 2, 1952, four days prior to the expiration date of the first sentence and while he was serving the second sentence, a conditional release violator warrant for petitioner's arrest was issued (R. 4-5, 10, 16). On February 6, 1954, after petitioner was conditionally released under the 18-month sentence the warrant was executed and petitioner was ordered to serve out the full term of the first sentence (R. 11, 16), i. e., until May 20, 1957, or with good time allowance until April 20, 1956 (R. 11, 17).

In a petition for a writ of habeas corpus filed in the United States District Court for the Western District of Washington in March 1954 (R. 3-6), petitioner challenged the legality of his present confinement on the ground that, under 18 U. S. C. 4164, as amended, there was no authority to issue the conditional release violator warrant less than 180 days before expiration of the maximum term.

The District Court held that the Parole Board had power to issue the warrant in question and denied the petition (R. 14-19, 20-21). On appeal, the order was affirmed (R. 43).

ARGUMENT

Petitioner contends that, since there remained less than 180 days of his original sentence when the conditional release violator warrant was issued,

[1] Originally he was sentenced to a 3-year term which was to run concurrently with the first sentence but this was subsequently reduced to 18 months (R. 16, 30-31).

he could not, by reason of 18 U. S. C. (1946 ed.) 4164, as amended by the Act of June 29, 1951, c. 176, 65 Stat. 98, *supra*, pp. 2-3, be legally retaken under that warrant. Petitioner recognizes (Pet. 8) that under 18 U. S. C. 4205, *supra*, p. 3, a warrant for the retaking of a parole violator "may be issued * * * within the maximum term or terms for which he was sentenced", but he argues that the phrase "maximum term" as used in that section must be interpreted in the light of 18 U. S. C. 4164, as amended, and therefore means the maximum sentence less 180 days.

The interpretation contended for by petitioner misconceives the narrow purpose of Section 4164, as amended. That section was reenacted in its modified form for the purpose of achieving a specific and narrow result, *i. e.*, to avoid the expense and trouble "in returning to custody the relatively minor number of conditional releasees who violate the terms of their release" and "who have short unexpired terms to serve * * * in those cases in which the prisoners have less than 180 days remaining" (S. Rep. No. 385, 82d Cong., 1st sess., p. 2; see also H. Rep. No. 314, pp. 1-4, 82d Cong., 1st Sess.). See *Shepherd* v. *United States Attorney General*, 108 F. Supp. 13, 14 (M. D. Pa.). There is nothing whatsoever in the language of section 4164, as amended, or in the legislative history of the amendment to show that the section, as modified, was intended to have a broader reach or to affect the meaning of the other parole statutes such as 18 U. S. C. 4205, *supra*, p. 3. In particular, there is no reason to believe that Congress intended the

amendment to apply to a released prisoner, such as petitioner, who has violated the conditions of his release *prior* to the beginning of the 180-day period.

Section 4205 does not, as petitioner infers (Pet. 8), use just the phrase "maximum term", which standing alone might be ambiguous, but reads "the maximum term or terms for which he was sentenced". There is no ambiguity in that phrase. It means the prisoner's full sentence, which in petitioner's case expired only on May 6, 1952. As this Court said in *Anderson* v. *Corall*, 263 U. S. 193, 196 and *Zerbst* v. *Kidwell*, 304 U. S. 359, 361, 362, which were relied upon by the court below (R. 41), it is the violation of the parole that interrupts and suspends the service of the original sentence, not the service of the warrant. Although these cases were decided prior to the amendment of June 29, 1951, the same reasoning applies to the instant case (Pet. 9-10). Here, the violation occurred in March 1951, several months before the 180-day period which commenced only in November 1951. 18 U. S. C. 4164, as amended, did not, therefore, preclude issuance of the warrant in this case at any time prior to the expiration of the maximum term.[3]

---

[3] Although petitioner asserts (Pet. 11-13) a conflict between this decision and that in *Moorehead* v. *Hunter*, 198 F. 2d 52 (C.A. 10), he recognizes that the issue actually decided in that case was that the 1951 amendment of section 4164 did not apply to a warrant issued prior to its effective date. Hence, in that case the court never reached the question presented here.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions, and further review is not warranted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

DECEMBER, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 [illegible]